

Office of the Secretary of Defense

§ 310.28

(2) Exempt records that have been incorporated into a nonexempt system of records are still exempt but only to the extent to which the provisions of the Act for which an exemption has been claimed are identified and an exemption claimed for the system of records from which the record is obtained and only when the purposes underlying the exemption for the record are still valid and necessary to protect the contents of the record.

(3) If a record is accidentally misfiled into a system of records, the system notice and rules for the system in which it should actually be filed shall govern.

§ 310.27 Access exemption.

(a) An individual is not entitled to access information that is compiled in reasonable anticipation of a civil action or proceeding.

(b) The term “civil action or proceeding” is intended to include court proceedings, preliminary judicial steps, and quasi-judicial administrative hearings or proceedings (i.e., adversarial proceedings that are subject to rules of evidence).

(c) Any information prepared in anticipation of such actions or proceedings, to include information prepared to advise the DoD Component officials of the possible legal or other consequences of a given course of action, is protected.

(d) The exemption is similar to the attorney work-product privilege except that it applies even when the information is prepared by nonattorneys.

(e) The exemption does not apply to information compiled in anticipation of criminal actions or proceedings.

§ 310.28 General exemption.

(a) *Use of specific exemptions.* A DoD Component is not authorized to claim the exemption for records maintained by the Central Intelligence Agency established by 5 U.S.C. 552a(j)(1) of the Privacy Act.

(b) The general exemption established by 5 U.S.C. 552a(j)(2) of the Privacy Act may be claimed to protect investigative records created and maintained by law-enforcement activities of a DoD Component.

(c) To qualify for the (j)(2) exemption, the system of records must be maintained by a DoD Component, or element thereof, that performs as its principal function any activity pertaining to the enforcement of criminal laws, such as the U.S. Army Criminal Investigation Command, the Naval Investigative Service, the Air Force Office of Special Investigations, and military police activities. However, where DoD offices perform multiple functions, but have an investigative component, such as the DoD Inspector General Defense Criminal Investigative Service or Criminal Law Divisions of Staff Judge Advocates Offices, the exemption may be claimed. Law enforcement includes police efforts to detect, prevent, control, or reduce crime, to apprehend or identify criminals; and the activities of military trial counsel, correction, probation, pardon, or parole authorities.

(d) Information that may be protected under the (j)(2) exemption includes:

(1) Records compiled for the purpose of identifying criminal offenders and alleged offenders consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, parole, and probation status (so-called criminal history records);

(2) Reports and other records compiled during criminal investigations, including supporting documentation.

(3) Other records compiled at any stage of the criminal law enforcement process from arrest or indictment through the final release from parole supervision, such as pre-sentence and parole reports.

(e) The (j)(2) exemption does not apply to:

(1) Investigative records prepared or maintained by activities without primary law-enforcement missions. It may not be claimed by any activity that does not have law enforcement as its principal function except as indicated in paragraph (c) of this section.

(2) Investigative records compiled by any activity concerning employee suitability, eligibility, qualification, or for individual access to classified material